HEIRS OF GEORGE MARTINEZ
HEIRS OF ARTHUR CHAVEZ

IBLA 86-1523, 1524 Decided August 15, 1988

Appeals from decisions of the Albuquerque District Office, New Mexico, Bureau of Land Management, rejecting lieu stock-raising homestead entry applications. SF-079550, SF-079606.

Reversed and remanded.

1. Applications and Entries: Relinquishment -- Exchanges of Land: Generally -- Indians: Lands: Allotments on Public Domain: Generally -- Public Lands: Disposals of: Generally -- Stock-Raising Homesteads

An Indian who has received an allotment of 160 acres of public domain land pursuant to sec. 4 of the Act of Feb. 8, 1887, 25 U.S.C. § 334 (1982), is deemed to have exhausted his rights under the Stock Raising Homestead Act, as amended, 43 U.S.C. §§ 291-301 (1976), only to that extent and may be entitled to apply for a stock-raising homestead entry of 480 acres of public domain land, and, upon relinquishment of that application, pursuant to sec. 13 of the Act of Mar. 3, 1921, 41 Stat. 1239, to apply for 480 acres of lieu lands, if there has been compliance with all applicable laws.

APPEARANCES: Paul Fyfe, Esq., and Dorothy Alther, Esq., Crownpoint, New Mexico, for appellants.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

The heirs of George Martinez and Arthur Chavez have appealed from two decisions of the Albuquerque District Office, New Mexico, Bureau of Land Management (BLM), each dated July 8, 1986, rejecting lieu stock-raising homestead entry applications SF-079550 and SF-079606, respectively.

The record indicates that George Martinez and Arthur Chavez filed applications for stock-raising homestead entries pursuant to the Stock Raising

Homestead Act (SRHA), as amended, 43 U.S.C. §§ 291-301 (1976) 1/ (repealed effective Oct. 21, 1976, by section 702 of the Federal Land Policy and Management Act of 1976 (FLPMA), P.L. 94-579, 90 Stat. 2787 (1976)), on June 1, 1931 (SF-064368), and May 22, 1931 (SF-064273), respectively. 2/ On November 27, 1932, both Martinez and Chavez executed documents relinquishing their stock-raising homestead entry applications, stating:

> That I hereby relinquish to the United States of America, all my right, title, and interest in and to the said section of land, this relinquishment being made only for the purpose of consolidation of Indian Lands, and on further condition that I be allowed to file a lieu selection upon the Public Domain or within the area consolidated for the Navajos.

Subsequently, on June 12 and August 22, 1946, respectively, Martinez and Chavez executed documents in which they each applied, pursuant to section 13 of the Act of March 3, 1921, 41 Stat. 1239 (1921), 3/ for 640 acres of land 4/ in lieu of that land sought in their relinquished stock-raising homestead entry applications.

By decisions dated August 29 and October 18, 1960, BLM held the respective lieu stock-raising homestead entry applications of Martinez and Chavez (SF-079550 and SF-079606) for rejection. 5/ In each case, BLM stated that

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1/ Martinez applied for 640 acres of land described as sec. 30, T. 18 N., R. 6 W., New Mexico Principal Meridian, McKinley County, New Mexico. The Chavez application described 640 acres of land as sec. 32, T. 18 N., R. 6 W., New Mexico Principal Meridian, McKinley County, New Mexico.

2/ While section 702 of the Federal Land Policy and Management Act of 1976 (FLPMA), 90 Stat. 2787, expressly repealed the SRHA, the Department had long held that the SRHA had been impliedly repealed by the Taylor Grazing Act, 43 U.S.C. § 315 (1982). See Daniel A. Anderson, 31 IBLA 162 (1977); George J. Propp, 56 I.D. 347 (1938).

3/ Section 13 of the Act of Mar. 3, 1921, provided, in relevant part, that:

> "The Secretary of the Interior is hereby authorized in his discretion, under rules and regulations to be prescribed by him, to accept * * * relinquishments of valid homestead entries or other filings * * * and to permit lieu selections by those surrendering their rights so that the holdings of any claimant within any township wherein such * * * relinquishments are made may be consolidated and held in solid areas."

41 Stat. 1239 (1921).

4/ Martinez and Chavez each applied for 640 acres of land, described as sec. 11, T. 17 N., R. 6 W., and sec. 17, T. 18 N., R. 7 W., New Mexico Principal Meridian, McKinley County, New Mexico, respectively.

5/ The reasons stated by BLM were that it determined the land selected by Martinez to be necessary for retention in Federal ownership in order to provide flood control and protection of grazing lands in the area, and that Chavez had no grazing privileges for the land he had selected and allowance of the application would substantially reduce the existing group allotment.

the decision would become final 30 days from its receipt unless an appeal was filed with the Director, BLM. In the case of Chavez, BLM also stated that rejection would "not prejudice the applicant's right to select other vacant land where no conflict will result." There is no evidence that appeals were ever taken from those decisions, and the cases were closed by BLM.

After many years, on October 2, 1985, counsel for the heirs of Martinez notified BLM that the heirs wanted to "apply for a homestead to fulfill the lieu selection which Mr. Martinez made but which was not granted," and that the heirs desired sec. 11, T. 17 N., R. 6 W., New Mexico Principal Meridian, McKinley County, New Mexico, the same land included in Martinez' lieu application. Also, on January 2, 1986, counsel for the heirs of Chavez notified BLM that the heirs wanted to apply for a homestead to fulfill the lieu selection of Chavez, and that the heirs desired the N 1/2 sec. 14, and the W 1/2, SE 1/4 sec. 35, T. 17 N., R. 6 W., New Mexico Principal Meridian, McKinley County, New Mexico. This was not the same land included in Chavez' lieu application. 6/

In its July 1986 decisions, BLM again rejected lieu selection applications SF-079550 and SF-079606. The rationale for rejection was that prior to filing these applications Martinez and Chavez had been issued trust patents for Indian allotments and, as such, they were not also entitled to a homestead entry. In support of these decisions, BLM cited the case of Francis Frazier, 42 L.D. 192 (1913). The record indicates that certificates of Indian allotment were issued to Martinez and Chavez on February 3, 1912, and trust patents were issued, respectively, on July 23, 1919, and October 1, 1942, prior to the filing of their lieu applications. 7/

The BLM decisions appealed from relate only to the lieu applications of appellants' predecessors-in-interest which were rejected by BLM with apparent finality in 1960, although BLM did advise Chavez of his right to select other

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fn. 5 (continued)
These determinations were made pursuant to the directive in 43 CFR 149.12 (25 FR 650 (Jan. 26, 1960)), that proposed exchanges would be approved if the "selected lands are suitable for disposal through exchange and are not needed for any other program or disposal." See Solicitor's Opinion, M-36436 (May 9, 1957) at 3.

6/ By letter dated Aug. 25, 1982, the Eastern Navajo Agency, Bureau of Indian Affairs (BIA), had requested BLM to "reopen" the lieu application of Chavez. In a Mar. 22, 1984, letter, the Eastern Navajo Agency, purporting to act on behalf of the heirs of Chavez, also requested BLM to process the original stock-raising homestead entry because the lieu application had neber been approved, and to patent the land accordingly. There is no evidence in the case record of BLM action on either BIA request.

7/ The Martinez allotment (016202) covers the SW 1/4 sec. 10, T. 17 N., R. 6 W., New Mexico Principal Meridian, McKinley County, New Mexico. The Chavez allotment (075808) encompasses the NE 1/4 sec. 35, T. 17 N., R. 6 W., New Mexico Principal Meridian, McKinley County, New Mexico.

land. Under the doctrine of administrative finality, the Board would ordinarily not be required to adjudicate an appeal involving those same applications where no appeal had been taken from BLM's prior rejection. John Lynn Brough, 33 IBLA 36 (1977). However, unlike the situation in Brough, there is no proof in the present case records that appellants' predecessors-in-interest were ever served with the 1960 BLM decisions. Accordingly, under these circumstances, we conclude that the Board is not barred from considering the present appeals.

In their statements of reasons for appeal, appellants contend that, having met the qualifications for a homestead under 43 U.S.C. § 161 (1976), i.e., head of a family or at least 21 years of age and a citizen of the United States, appellants' predecessors-in-interest were entitled to apply for stock-raising homesteads. Appellants argue that the holding in Frazier that the recipient of an Indian allotment on public domain land, as distinguished from reservation land, would not also be entitled to a stock-raising homestead entry was dictum, ignored the differences between an allotment and a stock-raising homestead entry, violated the Department's trust responsibility to Indians and denied appellants' predecessors-in-interest the equal protection of the laws vis-a-vis allottees of reservation land and other homesteaders, in violation of the Fifth Amendment to the United States Constitution. In the alternative, appellants argue that the land allotted to appellants' predecessors-in-interest should be considered reservation land where, in restoring the land to the public domain in December 1908, President Roosevelt exceeded the authority granted him by Congress and, thus, as allottees of reservation land, appellants' predecessors-in-interest were also entitled to apply for a stock-raising homestead entry under the holding in Frazier.

[1] The initial question presented by this case is whether the recipient of an Indian allotment of public domain land was then also entitled to apply for a stock-raising homestead entry. 8/ In addressing that question, we start with the Frazier case, cited by BLM. In that case, Assistant Secretary Laylin concluded that an Indian was entitled to a homestead entry of

8/ For purposes of resolving this initial question, we regard the land allotted to appellants' predecessors-in-interest as public domain land. This is supported by the fact that copies of the Martinez and Chavez certificates of allotment state that the allotment applications were filed "under the fourth section of the Act of February 8, 1887, [25 U.S.C. § 334 (1982)]." That section applies to allotments of "surveyed or unsurveyed lands of the United States." 25 U.S.C. § 336 (1982). Such land is "public domain" land. 25 U.S.C. § 336 (1982). In any case, this Board has no authority to void the Executive order which returned the land to the public domain. Such orders have the force and effect of law, City of Phoenix v. Reeves, 14 IBLA 315, 325 (1974), and, as such, are binding on the Board. Cf. Joseph J. C. Paine, 83 IBLA 145 (1984); Colorado-Ute Electric Association, Inc., 46 IBLA 35 (1980), aff'd, Colorado-Ute Electric Association, Inc. v. Watt, 533 F. Supp. 197 (D. Colo. 1982), rev'd in part, Nevada Power Co. v. Watt, 711 F.2d 913 (10th Cir. 1983).

160 acres of land made in 1910 because he had not exhausted his homestead right where, in receiving a trust patent for 160 acres of land as an Indian allotment in 1885, he "did not make an entry of Government lands," but, rather, "took from tribal lands." 9/ Francis Frazier, supra at 195. However, the Assistant Secretary also stated that an allotment of 160 acres pursuant to section 4 of the Act of February 8, 1887, would exhaust an Indian's homestead right. Thus, Frazier indicates that an Indian allottee is qualified to make a homestead entry, but that the right to make such an entry may be exhausted where the Indian has received an allotment for 160 acres of public domain land. 10/

At the time of the decision in Frazier, homestead entries were limited by statute to one-quarter section or 160 acres of public land. 43 U.S.C.

9/ The doctrine of exhaustion applied in Frazier was presaged in two earlier decisions. In Turner v. Holliday, 22 L.D. 215 (1896), an Indian who had received a patent to 80 acres of land as a member of the Chippewa tribe of Indians was also accorded a patent of 160 acres of land under a homestead entry. The Indian thereby received more than he would have been entitled to under the homestead laws in effect at that time. This presumably was based on his prior allotment of reservation land. Also, in Frank Bergeron, 30 L.D. 375 (1900), an Indian who had received an allotment under the Act of Feb. 8, 1887, within the reservation of the tribe of which he was a member was also allowed to make a homestead entry. In a statement approved by the Acting Secretary, Assistant Attorney General Van Devanter concluded:

"The reservation for the Citizen Band of Pottawatomies in Oklahoma, was paid for out of money belonging to the Indians (Treaty of February 27, 1867, 15 Stat., 531), and the allotment thereof to the individual members of the band was simply a dividing up of their property. The allottees received nothing from the United States by reason of such allotment. It does not seem that the mere fact that this man received his proportionate share of the land held in common by his tribe should of itself disqualify him from taking land for a homestead as a citizen of the United States." Id. at 377 (emphasis added). Cf. Walter Maine, 52 L.D. 510, 511 (1928) ("making of a desert land entry for 160 acres does not affect a person's right under the stock-raising homestead act or any of the homestead laws"). 10/ Under section 6 of the Act of Feb. 8, 1887, 24 Stat. 390 (1887), Congress provided that "every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act * * * is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens." In Instructions, 37 L.D. 219, 223 (1908), Assistant Secretary Wilson stated that "privileges" included the "privilege to make a homestead entry under the provisions of the homestead laws, just as any other citizen." See United States v. Krause, 92 F. Supp. 756, 761 (W.D. La. 1950); Moses C. Tingley, 46 L.D. 490, 491 (1918); Hattie Fisher Hall, 43 L.D. 471, 475 (1914). See also Turner v. Holliday, supra.

§§ 161, 211, 213, 214 (1970); St. Paul, Minneapolis & Manitoba Railway Co. v. Donohue, 210 U.S. 21 (1908). Also, at that time, the prerequisite of settlement for establishing entitlement to an Indian allotment was deemed to be comparable to that for establishing entitlement to a homestead entry. Thus, in Instructions, 32 L.D. 17, 19 (1903), Secretary Hitchcock interpreted "settlement," as required under section 4 of the Act of February 8, 1887, "to mean practically the same as it does under the homestead law, where the essential requirement is actual inhabitancy of the land to the exclusion of a home elsewhere." See also Henry Ford, 12 L.D. 181, 182 (1890); Lacey v. Grondorf, 38 L.D. 553, 555 (1910). In this context, it is understandable why the Assistant Secretary in Frazier would state that an Indian who had been allotted 160 acres of public domain land by virtue of settlement under section 4 of the Act of February 8, 1887, would have thereby exhausted his right to also acquire 160 acres of public domain land by virtue of similar acts under the homestead law. 11/

As the Supreme Court noted in United States v. Jackson, 280 U.S. 183, 195 (1930) (quoting Jim Crow, 32 L.D. 657, 659 (1904)), "'Congress has recognized that allotment claims are of the same nature as homesteads.'" The court also quoted with approval the statement in Jim Crow that section 4 of the Act of February 8, 1887, shares the same purpose as the earlier statutes which extended the benefits of the homestead laws to Indians (codified at 43 U.S.C. §§ 189, 190 (1970)), i.e., "'to give Indians a right to secure homes upon the public domain.'" United States v. Jackson, supra at 195; see also Toss Weaxta, 47 L.D. 574 (1920). That same purpose is also satisfied by according Indians the benefits of the homestead laws directly, i.e., as citizens of the United States. All of this supports the conclusion that rights under section 4 of the Act of February 8, 1887, and the homestead laws were equated and that, as such, allotment of public domain land constitutes an exhaustion of homestead rights. 12/ Cf. Clark v. Benally, 51 L.D. 91, 95 (1925) (section 4 of the Act of February 8, 1887, "one of the nonmineral land laws of the United States").

Subsequent to the Assistant Secretary's decision in Frazier, Congress enacted the SRHA on December 19, 1916. That Act provided that persons qualified under the homestead laws could make a stockraising homestead entry "for

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11/ We note, however, that the Department changed its interpretation of "settlement" under section 4 of the Act of Feb. 8, 1887, after Frazier was decided to require simply "reasonable use or occupancy." Regulations Governing Indian Allotments on the Public Domain Under Section 4, Act of Feb. 8, 1887, As Amended, 46 L.D. 344, 348 (1918); see Charley Anderson, 47 L.D. 187, 190 (1919).

12/ By equating allotments under section 4 of the Act of Feb. 8, 1887, and homestead entries for purposes of determining entitlement under the homestead laws, we do not mean to suggest that Indian allotments should be considered homestead entries for other statutory purposes. Indeed, this is plainly not the case. See Solicitor's Opinion, M-36697 (Oct. 7, 1966) (whether Indian allotment is "homestead entry" under section 3 of the Act of Aug. 28, 1937, 43 U.S.C. § 1181c (1976) (repealed effective Oct. 21, 1976, by section 702 of FLPMA)).

not exceeding six hundred and forty acres of unappropriated, unreserved public lands in reasonably compact form," which had been designated as stock-raising lands. 43 U.S.C. § 291 (1976). Generally speaking, the "effect" of the SRHA was simply "to enlarge the right of homestead entry from 160 acres of land of the character specified in said act to 640 acres." Walter Maine, supra at 511; see Instructions, 45 L.D. 625, 626 (1917); Charles A. Rutherford, 55 I.D. 353 (1935). The requirements for establishing entitlement to a patent of a stock-raising homestead entry were, for the most part, carried over from the other homestead laws, with a significant difference being that the requirement of construction of permanent improvements was substituted for the requirement of cultivation. See 43 U.S.C. § 293 (1976); 43 CFR 166.24 through 166.26 (homestead entries) and 168.1 (stock-raising homestead entries) (1949). Thus, applicants under the SRHA were required, with certain exceptions (see 43 U.S.C. § 295 (1976)), to establish residence on the land for a period of 3 years, to have a habitable house at the time of proof, to erect permanent improvements, and to actually use the land for raising stock and forage crops for a period of 3 years. Circular, 45 L.D. 625, 628 (1917).

Since the SRHA is one of the homestead laws, we find the doctrine of exhaustion enunciated in Frazier applied equally with respect to stock-raising homestead entries. However, because of the larger acreage entitlement under the SRHA than under the earlier homestead laws, an Indian allottee would have only partially exhausted his entitlement to the extent of his public domain Indian allotment. In the present case, appellants' predecessors-in-interest each received 160-acre public domain allotments. Therefore, they were each entitled, subject to establishing compliance with the requirements of the SRHA, to a 480-acre stockraising homestead entry. Likewise, it follows that Martinez and Chavez were, therefore, limited to 480 acres each for their lieu selections. For the above-stated reasons, the July 1986 BLM decisions appealed from are in error and must be reversed. 13/

As noted supra, under section 13 of the Act of March 3, 1921, the Secretary was authorized "in his discretion" to accept relinquishments of "valid homestead entries" and to permit lieu selections "so that the holdings of any claimant within any township wherein such * * * relinquishments are made may be consolidated and held in solid areas." 14/ 41 Stat. 1239 (1921).

13/ While BLM's decisions purportedly related to only the original lieu applications filed by Martinez and Chavez, the rationale for rejection adopted by BLM in its July 1986 decisions would be equally applicable to any new application filed by the heirs of Martinez or Chavez.

14/ Section 13 of the Act of Mar. 3, 1921, contemplated that the Secretary would promulgate "rules and regulations" in order to carry out the statutory provision. 41 Stat. 1239 (1921). These regulations were issued Sept. 19, 1922, and amended Mar. 6, 1930, and Aug. 3, 1932. See Instructions, 54 I.D. 21 (1932); Instructions, 53 I.D. 54 (1930); Instructions, 49 L.D. 281 (1922). The regulations were codified at 43 CFR 149.35 to 149.43 (1939). They were then amended, with no substantive change, and recodified at 43 CFR 149.33 to 149.41 (19 FR 8939-940 (Dec. 23, 1954)). Subsequently, the regulations were

Accordingly, a lieu selection is contingent first on relinquishment of a "valid" homestead entry. The case records before the Board do not indicate whether the homestead entries of Martinez and Chavez were "valid."

The regulations in effect at the time appellants' predecessors-in-interest filed their relinquishments and at the time they filed their lieu applications interpreted the requirement of having a "valid" homestead entry to mean that the applicant, in the case of an unperfected entry under the settlement laws, must either have "resided upon, cultivated, and improved the relinquished unperfected claim for the full period required by law to earn a patent thereto" or "establish and maintain a residence on the land selected and cultivate and improve the same for the full period required by law to earn a patent, less the time spent upon the relinquished unperfected claim." 54 I.D. at 25; 43 CFR 149.42 (1939). In the context of a stock-raising homestead entry, the requirement of permanent improvements would, as noted supra, be substituted for the requirement of cultivation. The regulations also provided that no patent would issue for any lieu selection until the applicant had "earned equitable title to the land." Id. Further, the regulations required that the land selected had to be of the same type entered; thus, requiring that the land was (or would have been) suitable for entry under the SRHA. 54 I.D. at 2; 43 CFR 149.41 (1939). 15/

These provisions were subsequently amended and recodified as general provisions applicable to exchanges under section 13 of the Act of Mar. 3, 1921, at 43 CFR 149.6 (25 FR 650 (Jan. 26, 1960)), which provided: "Patents will not issue for the selected lands when the offered lands are embraced in unperfected claims until the applicant complies with all the requirements of the law and regulations under which the unperfected claims have been held. The applicant will be credited with all acts of compliance whether earned in connection with the offered lands or selected lands or both."

Section 13 of the Act of March 3, 1921, also provided that the Secretary was authorized to permit lieu selections "so that the holdings of any claimant within any township wherein [the relinquishment is] * * * made may be consolidated and held in solid areas." 41 Stat. 1239 (1921). The applicable regulations in effect at the time appellants' predecessors-in-interest

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fn. 14 (continued)
again amended in 1960 (25 FR 650 (Jan. 26, 1960)); redesignated in 1964 (29 FR 4475 (Mar. 31, 1964)); consolidated in 1968 (33 FR 2515 (Feb. 2, 1968)); and finally deleted in 1970, (35 FR 9551 (June 13, 1970)). However, at the same time, in 1970 the Department provided that exchanges under section 13 of the Act of Mar. 3, 1921, would be handled "in a manner consistent with the authorized [law]." 35 FR 9551 (June 13, 1970). See 43 CFR 2271.0-3(b).

15/ The decision in George J. Propp, supra at 352-53, made clear that an application for a stock-raising homestead entry, made when the land was not classified as suitable therefor, gained the applicant no rights. Such an application could not give rise to a "valid" entry. Thus, unless the land had been favorably returned as stock-raising land, the application to enter could not serve as a valid basis for the exercise of lieu rights.

filed their relinquishments and at the time they filed their lieu selections provided that:

> The lands selected must, in conjunction with other property owned by the party conveying, be in a compact body, as near as may be possible, regardless of township lines; but no application will be considered involving lieu lands in any township wherein the selector owns no land and where the approval of such application will not effect a consolidation of the holdings of the applicant in such township or townships. Surveyed, unappropriated, and unreserved land * * * can be selected.

54 I.D. at 24; 43 CFR 149.40 (1939).

In the present case, we note that the lands selected by Martinez were within the same township and in close proximity to those lands allotted to him. However, the lands selected by Chavez were not within the same township or in close proximity to his allotted lands.

We conclude that the BLM decisions cannot be sustained. On remand, BLM should proceed to adjudicate any further application or applications in accordance with applicable law. 16/

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are reversed and the cases remanded to BLM for further action consistent herewith.

Bruce R. Harris
Administrative Judge

I concur:

James L. Burski
Administrative Judge

16/ The present record does not reflect whether appellants' predecessors-in-interest complied with the Recordation Act of 1955, 69 Stat. 534. Section 1 of that Act required, inter alia, any person claiming rights to any lieu selection under any Act of Congress to record that claim with the Department of the Interior within 2 years of the effective date of the Act, August 5, 1955. The Department promulgated regulations which specifically directed the procedure to be undertaken to secure recordation. 43 CFR 130.7 (1958). If there was no compliance with that statute, appellants would have no surviving lieu rights.